

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**
KENT COUNTY COURTHOUSE
DOVER, DELAWARE 19901
PHONE: (302) 739-4618

CHARLES W. WELCH, III
JUDGE

July 11, 2012

Seth H. Yeager, Esq.
Lyons, Doughty, and Veldhuis, P.A.
15 Ashley Place Suite B
Wilmington, DE 19804

Maggie R. Clausell, Esq.
9 E. Loockerman St., Ste. 205
Dover, DE 19901

RE: M & T Bank v. Shirley M. Bolden
C.A. No.: CPU5-10-001029

Decision After Trial

Dear Mr. Yeager and Ms. Clausell:

Plaintiff, M & T Bank, brought this civil action against the defendant, Shirley M. Bolden (hereinafter "Bolden"), seeking to collect a deficiency balance left on a car loan. M & T Bank is seeking recovery of \$11,768.86, the deficiency balance it contends is left on the loan after the sale of the repossessed car. Bolden contends that the car was not sold in a commercially reasonable manner as required by 6 *Del. C.* § 9-610 and, therefore, contests recovery on the deficiency balance. Additionally, Bolden has filed a counterclaim against M & T Bank for statutory damages pursuant to 6 *Del. C.* § 9-625 for M & T Bank's alleged failure to comply with 6 *Del. C.* § 9-610. A trial was held for this matter, after which the parties provided written closing arguments, and the Court reserved decision. For the reasons provided below, the Court enters judgment for the defendant on

M & T Bank's claim seeking a deficiency judgment. Further, the Court orders that the parties submit supplemental briefs regarding whether statutory damages are due to the defendant under 6 *Del. C.* § 9-625 and the amount, if damages are due.

FACTS

On or about November 20, 2007, Bolden entered into a conditional sales contract (hereinafter "the loan") which was assigned to M & T Bank for the purchase of a 2001 Mercedes-Benz CLK class automobile (hereinafter "the car") for her son. Bolden took physical possession of the car and M&T retained a security interest in it. Bolden defaulted on the loan and the car was repossessed on or about March 9, 2011. The defendant received notice of M & T Bank's intent to sell the car at private sale. The car was sold by the Manheim Auto Auction, in Philadelphia, Pennsylvania (hereinafter "Manheim"), on April 12, 2011, for \$3,900. The defendant's balance due on the loan at the time of the sale of the car was \$15,668.86.

The Manheim Auto Auction is one of the world's largest sales facilities for automobiles. The car was prepared for sale by Manheim. It was cleaned and certain items were repaired. Manheim then placed the car in a "dealers only" sale. In such a sale, only car dealers can attend the auction and purchase vehicles. M & T Bank could not provide any evidence as to how the sale was advertised or conducted. It did not know how many bidders were present that day or how many people bid on the car. Additionally, there was no testimony, or other evidence, introduced at trial indicating that the sale of the car was done in accordance with the accepted practices of reputable finance companies for, or dealers of, automobiles.

At the time that the car was sold by Manheim, the NADA trade-in value of similar automobiles, in good condition, was \$6,100. However, the car was in below average condition.

M & T Bank is seeking recovery of the \$11,768.86 deficiency balance left on the amount due to it after reducing the total amount due on the loan by the sale proceeds. Additionally, it is seeking attorney's fees and interest. Bolden has counterclaimed against M & T Bank for statutory damages pursuant to 6 *Del. C.* § 9-625 in the total amount of \$10,373.00 for M & T Bank's alleged failure to sell the car in a commercially reasonable manner as required by 6 *Del. C.* § 9-610.

DECISION

I. Commercial Reasonableness of the Sale of the Car.

There is no dispute that Bolden defaulted on her loan with M & T Bank and that the deficiency balance on the loan after application of the amount received for the sale of the car after repossession is \$11,768.86. However, before M & T Bank can recover the deficiency balance from Bolden, it has the burden of proving by a preponderance of the evidence that the sale of the car was done in a commercially reasonable manner as required by 6 *Del. C.* § 9-610.¹ *Hicklin v. Onyx Acceptance Corp.*, 970 A.2d 244, 253 (2009). M & T Bank has failed to meet this burden.

¹ 6 *Del. C.* § 9-610 provides as follows:

(a) **Disposition after default.** – After default, a secured party may sell, lease, license or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

(b) **Commercially reasonable disposition.** – Every aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

In deciding whether M & T Bank has sold the car in a commercially reasonable manner, the Court relies on the analysis provided by the Delaware Supreme Court case of *Hicklin v. Onyx Acceptance Corp.*, 970 A.2d 244 (2009). In *Hicklin*, a secured creditor took possession of a vehicle after default on a loan and proceeded to sell it at auction. *Id.* at 248. The creditor then sought a judgment to recover the deficiency balance left after the proceeds of the sale were applied against the amounts still owed to it by the debtor. *Id.* The debtor argued that the plaintiff had not complied with the “commercially reasonable” requirements of the UCC, and, therefore, was not entitled to a deficiency judgment. *Id.* at 249. Because of the similarities of the cases, the Court in this case is guided by the precedents established in *Hicklin*.

As the Delaware Supreme Court stated in *Hicklin*, “[b]ecause this dispute concerns a security interest in property, it is governed by Article 9 of the UCC.” *Id.* Under 6 *Del. C.* § 9-610, after a default, the secured party may dispose of the property in a commercially reasonable fashion. *Id.* Commercial reasonableness is determined on a case by case basis unless the manner of sale fits under one of the “safe harbor” exceptions of 6 *Del. C.* § 9-627(b) and (c). The safe harbor provision provided by 6 *Del. C.* § 9-627(c) does not apply to the present case as it is unsupported by the facts.² However, the safe harbor provision provided by 6 *Del. C.* § 9-627(b) is appropriate for the case at hand. It provides as follows:

§ 9-627(b) *Dispositions that are commercially reasonable.* - A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

² 6 *Del. C.* § 9-627(c) provides as follows:

A . . . disposition . . . is commercially reasonable if it has been approved:

- (1) in a judicial proceeding;
- (2) by a bona fide creditors’ committee;
- (3) by a representative of creditors; or
- (4) by an assignee for the benefit of creditors.

- (1) in the usual manner on any recognized market;
- (2) at the current price in any recognized market at the time of disposition; or
- (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

The Court in *Hicklin* explained that due to the fact that auctions of the kind at issue are not “recognized markets” in which sales are conclusively deemed commercially reasonable, when a secured creditor uses an auction to dispose of property, only the 6 Del. § 9-627(b)(3) “conformity with reasonable commercial practice among dealers in the type of property that was the subject of the disposition” safe harbor provision applies. *Hicklin*, 970 A.2d at 250. Therefore, *Hicklin* established that a secured creditor selling a car at auction could either fall under the safe harbor provision of 6 Del. § 9-627(b)(3) or it would be required to satisfy the more onerous burden of showing that every aspect of the sale was commercially reasonable. *Hicklin*, 970 A.2d at 250.

In the instant case, M & T Bank has failed to provide the evidence necessary to trigger the safe harbor provided by 6 Del. C. § 9-627(b)(3). The bank’s apparent unfamiliarity with the circumstances surrounding the auction of the car prevents it from showing that the sale was “in conformity with the accepted practices in the trade.” *Hicklin*, 970 A.2d at 252. Further, M & T Bank did not prove that the auction was a pervasive, industry approved, method for disposing of repossessed vehicles. Without adequate evidence of dealer auctions being a prevailing trade practice, M & T Bank cannot invoke the safe harbor provision available under 6 Del. C. § 9-627(b)(3).

Additionally, M & T Bank was unable to provide scarcely any relevant details at trial pertaining to the sale of the car. The bank did not provide any evidence relating to the advertisement of the sale or how the sale was conducted. Therefore, based on the

evidence introduced at trial, M & T Bank has failed to provide the necessary facts to establish that *every aspect* of the sales process was commercially reasonable. *Hicklin*, 970 A.2d at 252.

Because M & T Bank, the secured party for this case, failed to prove a “commercially reasonable sale of repossessed consumer collateral [it is barred] from recovering any deficiency.” *Hicklin*, 970 A.2d at 253. The evidence M & T Bank presented at trial is insufficient to establish that “*every aspect* of [the] sale [was] ‘commercially reasonable.’” *Id.* at 252. Further, M & T Bank did not provide sufficient facts to invoke the “accepted trade practice” safe harbor provision of 6 *Del. C.* § 9-627(b)(3).

II. Bolden’s Counterclaim for Statutory Damages.

The Court finds that under 6 *Del. C.* § 9-625(c)(1) and (2), when a debtor “shows that the creditor violated its duty under [Article 9] and that the collateral is a consumer good,” the debtor is eligible for an award of statutory damages. *Wilmington Trust Co. v. Conner*, 415 A.2d 773, 781 (1980). As it has been established that (1) M & T Bank failed to prove at trial that the car was sold in a commercially reasonable manner as required by 6 *Del. C.* § 9-610 and (2) that automobiles have been found to be within the meaning of “consumer good,” Bolden is eligible for an award of statutory damages pursuant to 6 *Del. C.* § 9-625. However, the Court reserves decision on whether such an award is appropriate in this case and, if so, the amount of the award until the parties have been given the opportunity to brief the Court on their position concerning an award of damages under 6 *Del. C.* § 9-625. The parties have 30 days to submit their written briefs to the Court on this issue.

CONCLUSION

In order to receive a deficiency judgment on a secured loan, a secured creditor must establish that it sold the collateral in a commercially reasonable manner. While there are different methods for establishing that a sale was commercially reasonable, M & T Bank did not provide sufficient facts at trial to prove that the sale of the car was completed in a commercially reasonable manner. Therefore, it is not entitled to recover the deficiency balance on the loan. Further, M & T Bank's failure to prove that the sale was commercially reasonable makes Bolden eligible for statutory damages under 6 *Del. C.* § 9-625. The Court enters judgment for the defendant on plaintiff's claim and both parties are ordered to submit supplemental briefing within 30 days regarding whether an award of statutory damages to the defendant pursuant to 6 *Del. C.* § 9-625 is appropriate in this case and, if so, the amount that should be awarded.

IT IS SO ORDERED.

Sincerely,



Charles W. Welch, III

CWW:mek